United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

807

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,700

RANDOLPH FRANKLIN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

No. 23,701

JAMES E. CARTER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

STATEMENT OF ISSUES*

1. Whether the evidence sustained a verdict of guilty and judgment thereon by the Court below, when such evidence disclosed that two of the items involved were valued at less than $100.00 respectively?

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*This is the first time this case has been before this Court.

2. In view of the fact that the item alleged to have been taken by defendant Franklin admittedly was of a wholesale value of less than $100.00, should the Court below have severed Franklin and afforded him a separate trial on the charge of petty larceny?

STATEMENT OF THE CASE

This is an appeal from a judgment of the Court below entered on a verdict finding the Defendants, Appellants here, guilty of grand larceny in violation of 22-2201, D.C. Code, 1967, ed. Both defendants timely appealed, and this Court, *sua sponte*, directed that their appeals be joined. Undersigned counsel has been appointed by this Court to represent both Appellants.

This case involves the alleged theft of two ladies suits, having an alleged retail value of $310.00 and $165.00 respectively, and a suede coat having an alleged retail value of $110.00, from Julius Garfinkel and Co. Inc., a store located in Washington, D.C. The wholesale value of these items however, was $51.40 for the suede coat (Tr. 61-2) $169.75 for the ladies suit retailed at $310.00 (Tr. 63) and $89.75 for the ladies suit retailed at $165. (Tr. 63). These retail and wholesale values were testified to by Garfinkel employees who appeared as government witnesses.

According to these witnesses, the defendants were seen in the store on the morning of September 7, 1968 looking at the suede coats (Tr. 27). Nothing was taken by either Franklin (Tr. 33) or Carter (Tr. 34).

Later in the day, Sanders, a store detective, testified that he saw two men whom he identified as Carter and Franklin, on the stairway on the third floor, and that at his approach, he said, Carter ran upstairs and Franklin ran downstairs. Sanders pursued Franklin and participated in his arrest at 1317 F. Street, N.W.

Upon returning to the store with Franklin, Sanders said he saw Carter and arrested him. (Tr. 43).

Thereafter, both Franklin and Carter were charged, given preliminary hearings, and bound over for the grand jury. The indictment, trial and conviction followed. This is the appeal.

ARGUMENT

1. **The record clearly establishes, upon the testimony of the government witnesses, that each appellant was charged with the theft of an item valued at less than $100.00. Only one of these items involved a ladies suit allegedly taken by Carter, had a value in excess of $100.00. In these circumstances, it was improper and legal error to try both defendants on a charge of grand larceny. Therefore, the subsequent convictions should be reversed.**

In this, as in every other cause between the government and its citizens, the obligation is clearly upon the government to afford the citizen a constitutional trial. Guilt or innocence alike must be determined within the framework of the constitutional guarantees. This, it is asserted has been denied these appellants.

The charge upon which appellants were tried, convicted and sentenced, was grand larceny. In this jurisdiction, this involves a trespassory taking of goods having a value of more than $100.00. The evidence clearly establishes that of the three items involved, a ladies suit, the taking of which was charged to Carter, had a value of $89.75 and the suede coat the taking of which was charged to Franklin, had a value of only $51.40. This was the testimony of the government witnesses.

Clearly, on this record, Franklin is guilty, if he is guilty of anything, of nothing more than petty larceny. Clearly, too, the charges of grand larceny against Carter can rest only on one item, the coat which retailed for $310.00.

The vice of this indictment is thus two fold: (1) it charges grand larceny where only petty larceny is the crime which might be alleged, and (2) by joining the greater and lesser larcenies together, the jury was misled and prejudiced against the defendants. The jury, it is submitted, was in effect directed to find that lumping together the defendants, the three items, the resulting conglomorate spelled out grand larceny.

This, it is submitted, deprived the appellants of a fair trial on the crime alleged. The jury was invited to speculate as to guilt. It was prejudiced by the allegation of the greater crime, grand larceny. The net was that appellants were denied the constituional safeguard of a trial by a jury fully and clearly informed of the charge upon which they were to determine the guilt or innocence of the defendants. A jury verdict so determined, and a judgment or conviction thereon, cannot stand.

2. **The court below, upon the development of the evidence that one defendant (Franklin) could not be charged with taking goods of the value of $100, and that the other defendant (Carter), was involved in the taking of only one item which might have a value in excess of $100, should have severed the trials, in order that the evidence as to each defendant on each of the items, might have been clearly imputed to him and him alone, and in turn, have the jury consider that evidence only as to each defendant**

Here again, we stress the obligation imposed on the government to afford an accused a constituional trial. Here again we submit that such has been denied these defendants. And, here we urge that severance could have cured this error, and that the failure of the court below to sever the two defendants is reversible error.

The joinder of these defendants reflected an administrative advantage to the prosecution. *King v. United States,* 355 F.2d 700, 704 (C.A. 1, 1966). Rule 14, Federal Rules of Criminal Procedure,

broadly empowers the trial court to sever defendants. This authority continues throughout the trial, and "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960).

This "prejudice", it is submitted, appeared when the record disclosed the defendant Franklin had taken goods having a value of less than $100 and when, it appeared, that defendant Carter had taken goods in excess of that value. Trial of the two together from that point on was a denial of a constitutional trial, at least for defendant Franklin.

However, severance was necessary, too, for the preservation of Carter's constitutional rights. He was joined in a single trial with another. By accretion, the crime alleged to have been committed by Franklin accrued to him. The jury had before it two alleged criminals, and three alleged items of stolen property, having a total retail value of nearly $600.

Instead, as to Franklin, the jury should have had before it only one defendant, involving only one item of stolen property, having a value of less than $100, and as to Carter, the jury should have had before it, again only one defendant, involving only one item, the coat having a value of only $169.75, if grand larceny was charged.

This is the vice of the failure to sever.

CONCLUSION

Accordingly, for the foregoing reasons, the judgments of convictions should be reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF FOR APPELLANTS

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SUPPLEMENTAL BRIEF FOR APPELLANTS

ISSUES PRESENTED *

(1) Whether Appellant Franklin was deprived of a fair trial because the instructions to the jury allowed it to base a finding of grand larceny on evidence which would support only a finding of petty larceny?

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* This case has not previously been before this Court.

(2) Whether the evidence in the record will support convictions for grand larceny based upon the theory that Appellants Franklin and Carter aided and abetted each other?

(3) Whether Appellants Franklin and Carter were deprived of a fair trial because of the District Court's failure to sever the two trials?

STATEMENT OF THE CASE

Reference is made to the Brief for Appellants, previously filed with this Court.

ARGUMENT

I. APPELLANT FRANKLIN WAS DEPRIVED OF A FAIR TRIAL BECAUSE THE INSTRUCTIONS TO THE JURY ALLOWED IT TO BASE A FINDING OF GRAND LARCENY ON EVIDENCE WHICH WOULD SUPPORT ONLY A FINDING OF PETTY LARCENY.

(Tr. 27 - 28, 42, 56 - 57, 81).

Defendant Franklin was tried and found guilty of grand larceny in violation of 22 D. C. Code §2201. Under the Code, grand larceny is defined as larceny of property worth $100 or more.

In order to sustain a charge of grand larceny, the government has the duty to prove by competent evidence that the value of the subject matter is higher than the petty larceny classification. Henry v. United States, 49 U. S. App. D. C. 207, 263 F. 459 (1919). Absence of such evidence requires reversal of a grand larceny conviction. Ransom v. United States, 119 U. S. App. D. C. 154, 337 F. 2d 550 (1964).

The judge instructed the jury that an essential element of the offense of grand larceny was that "the property so taken and carried away was of the amount or value of $100 or more" (Tr. 81). This instruction was not sufficient to clarify the proper means for determining the value of the property allegedly stolen, in light of the evidence before the jury.

The record shows that when Franklin was arrested he had only one item of Garfinckel's property in his possession, namely a suede coat (Tr. 42). Testimony indicated that the cost of this coat to Garfinckel's was $51.40 (Tr. 62). In addition, the government witness stated that the retail value of this suede coat was $110.00 (Tr. 61).

In light of evidence giving both the wholesale and retail value of the suede coat found in the possession of Franklin, it was incumbent upon the trial judge clearly to tell the jury the proper basis for determining the value of the property since a valuation at wholesale value would have precluded a finding of grand larceny based solely on the evidence of goods found in the possession of Franklin.

These essential clarifying instructions were not given by the trial judge. Rather the jury was merely told that an essential element of the offense of grand larceny which the government must prove beyond a reasonable doubt was "that the property so taken and carried away was of the amount or value of $100 or more." (Tr. 81)

Thus the jury was left free to speculate as to whether the value of the coat should be based on retail or wholesale value.

This Court has recently stated that "it is not a settled matter of law in this jurisdiction whether the relevant market for goods on display in a store is the wholesale or the retail market." Gaither v. United States, 134 U. S. App. D. C. 154, 168, 413 F. 2d 1061, 1075 (1969). In that case, this Court suggested that retail price would seem the most reasonable measure for the value of goods ready for retail sale. Id. This suggestion should be rejected and this Court should rule that for purposes of determining whether an accused person is guilty of grand larceny, goods allegedly stolen from a store must be based upon the wholesale price of those goods. A contrary ruling would leave the jury free to speculate as to the value of the goods, including speculation upon such questions as whether the goods in question would have to be sold on a sale if they could not be sold at the price at which they were marked. Such speculation should not be permitted when the determination whether an accused person will be found guilty of a misdemeanor or a felony is at stake.

Nevertheless, even if this Court should conclude that the relevant market for goods on display in a store is the retail market, the suede coat found in Franklin's possession still could not properly be valued at retail price for purposes of proving grand larceny. The evidence in the present case clearly shows that the suede coat was not on display. Cf. Gaither v. United States, 134 U. S. App. D. C. 154, 168, 413 F. 2d 1061, 1075 (1969).

Testimony by government witnesses indicates that at the time of the alleged larceny, no suede coats were on display for sale at Garfinckel's.

Coats that had been on the display rack on Garfinckel's floor had been removed and had been "put away" (Tr. 27 - 28, 56 - 57). Thus, with the exception of one suede coat which was placed in the office of a Garfinckel's buyer, all of the department store's suede coats were either "taken from the rack and placed behind glass" or were "in the locked stockroom off the floor" (Tr. 56 - 57). At no point did evidence adduced at the trial indicate whether the suede coat found in the possession of Franklin was taken from the buyer's office, from behind the glass, or from the locked stock room. Only one fact is certain from the record -- namely that the suede coat found in the possession of Franklin could not have been taken from the display rack in the store.

Thus, on the present record it would have been impermissible for the jury to have valued the suede coat in excess of $100 or more.

II. THE EVIDENCE IN THE RECORD WILL NOT SUPPORT CONVICTIONS FOR GRAND LARCENY BASED UPON THE THEORY THAT APPELLANTS FRANKLIN AND CARTER AIDED AND ABETTED EACH OTHER.

(Tr. 38 - 56, 79 - 81).

The prejudical error caused by allowing the jury to speculate as to the possible basis for valuing the suede coat in the possession of Franklin and possibly to reach a finding of grand larceny on the basis of the retail value of the coat was not ameliorated by the instruction given to the jury that one who aids or abets another in the commission of a crime is punishable as a principal. (See Tr. 79 - 81).

In the present case, the evidence presented to the jury was not sufficient to establish that Appellants Franklin and Carter were aiding and abetting each other. Appellants were not seen together taking any property from Garfinckel's. Appellants were arrested at different times and in different places (Tr. 41 - 43). Indeed, the only evidence linking Franklin together with any of the goods allegedly stolen by Carter was the testimony of one government witness that he saw Appellants on the stairway each with one hand on a bag putting two ladies suits in a Hecht's bag (Tr. 38-39). Yet this same witness admitted that he was never closer than 30-35 feet from the two men he allegedly saw (Tr. 45 - 46). Further this witness admitted that one of the two men that he saw had "his back turned to me. I didn't see his face on the stairway." The man seen by this witness ran down the stairway and for about a minute or half a minute was lost to the sight of the witness (Tr. 39 - 40). According to the witness' testimony, after losing sight of the man seen running down the stairway, he saw Franklin towards the front of the store and pursued him out of the store and down the street (Tr. 40). From the record evidence it is clear that this witness could not identify Franklin as the man seen on the stairs. Not only did the witness not see the face of the person on the stairs; he could not recall what clothing that person was wearing (Tr. 46). On the basis of this evidence,

a conviction for grand larceny based upon the theory that Franklin and Carter aided and abetted each other cannot be allowed to stand.

III. APPELLANTS CARTER AND FRANKLIN WERE DEPRIVED OF A FAIR TRIAL BECAUSE OF THE DISTRICT COURT'S FAILURE TO SEVER THE TWO TRIALS.

(Motion to Sever And to Grant Separate Trials to the Defendants, filed on April 3, 1969).

Rule 8 of the Federal Rules of Criminal Procedure provides that "two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

Rule 14 of the Fed. Rules of Criminal Procedure, provides that "if it appears that a defendant. . . is prejudiced by a joinder . . . of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

On April 3, 1969, Carter filed a motion to sever and grant separate trials to the defendants. Among the grounds given for severance were: (1) "The jury will have insurmountable difficulty in distinguishing the alleged acts of this defendant from the acts of his co-defendant;" (2) "This defendant as well as his co-defendant will obtain a fairer and more impartial trial if he is tried alone;" and

(3) "This defendant and his co-defendant were not together on the date indicated in the indictment, and the indictment includes two separate incidents occurring at different places and at different times, and this defendant will be prejudiced in having a single trial and and [sic] by the same jury on these unrelated and separate incidents."

To avoid the prejudice foreseen by Carter, the two trials should have been severed. In any case, the trials should have been severed at the time it became evidence that the evidence was not sufficient to support an aiding and abetting instruction (See Argument II). Both Appellants were prejudiced by the failure to sever.

With regard to Franklin, failure to sever the trials made it possible for the jury to base a finding of grand larceny upon the valuation of the goods allegedly stolen by both Carter and Franklin, rather than those goods found in the possession of Franklin alone. Indeed, failure to sever the trials raises the possibility that different members of the jury relied upon separate theories of valuation in reaching a finding of grand larceny. Thus, some members of the jury panel may have concluded that Franklin and Carter jointly stole the suede coat found in Franklin's possession and the ladies' suits found in Carter's possession. On the other hand, some other members of the jury panel may have concluded that Franklin and Carter had not aided and abetted one another, but that each was independently guilty of grand larceny on the theory that the value of the goods found on each person exceeded $100. Allowing the jury to come to a conclusion

on either these two contradictory and legally impermissible theories constituted clear prejudice to Franklin.

Carter was similarly prejudiced by the failure to sever the two trials. Evidence as to the suede coat found in the possession of Franklin could only aggravate the testimony that Carter was found with two ladies' suits in his possession.

Furthermore, failure to sever the trial allowed the jurors to conclude that Carter was guilty of grand larceny because he aided and abetted Franklin, even if the jury were to conclude that the ladies suits were of a value less than $100.

Accordingly both appellants were prejudiced by the failure of the District Court to sever the two trials.

CONCLUSION

For the reasons set forth above, the judgments of conviction should be reversed.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

This is to certify that I have caused a copy of the Supplemental Brief For Appellants to be served on Appellee by mailing copies of same, by United States mail, postage prepaid, to their attorney, Robert J. Higgins, Esq., Assistant U. S. Attorney, United States Courthouse, Washington, D. C., 20001, on this 12th day of November, 1970.

Nolan E. Clark

Nolan E. Clark